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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 207

WILLIAM J. ROCHELLE, JR., Trustee in Bankruptcy of Major Appliance Company, Inc.,

Petitioner,

v.

CITY OF DALLAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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WILLIAM J. ROCHELLE, JR., Trustee in Bankruptcy of Major Appliance Company, Inc.,

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v.

CITY OF DALLAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, William J. Rochelle, Jr., Trustee in Bankruptcy of Major Appliance Company, Inc., a Texas corporation, Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 25, 1959.

OPINIONS BELOW

The opinion of the referee in bankruptcy (R. 4-14) is unreported and is printed in the Appendix, *infra*, p. 21. The opinion of the District Court (R. 29-30) is unreported

and is printed in the Appendix, *infra*, p. 19. The opinion of the Court of Appeals (R. 36-41), printed in the Appendix, *infra*, p. 13, is reported in 264 F. 2d 166.

JURISDICTION

The judgment of the Court of Appeals (R. 42), printed in the Appendix, *infra*, p. 30, was entered February 25, 1959. A timely petition for rehearing (R. 43-45), was denied on April 15, 1959 (R. 46). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED

Whether §67c(2) of the Bankruptcy Act invalidates as against a Trustee in Bankruptcy statutory liens created or recognized by the laws of a State for tax obligations of a State or subdivision thereof, the lien being on personal property and not accompanied by possession of, or by levy upon, or by sequestration or distraint of, such property.

STATUTES INVOLVED

The federal statutory provision involved is subdivision (2) of §67c of the Bankruptcy Act (11 U. S. C. §107c), added in its entirety to the Act by Public Law 456, 82nd Cong., 2d Sess., approved July 7, 1952, 66 STAT. 427 (1952). It provides:

> "(2) the provisions of subdivision (b) of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or

distraint of, such property, shall not be valid against the trustee: Provided, however, that so much of clause (1) of this subdivision c as restricts liens for wages and rent and clause (2) of this subdivision c shall not apply in proceedings under Chapter X of this Act, unless an order shall be entered therein directing that bankruptcy be proceeded with, or in proceedings under Section 77 of this Act. The court may on due notice order so much of any lien in excess of the restricted amount under clause (1) and any lien invalid under clause (2) of this subdivision c to be preserved for the benefit of the estate and, in any such event, such lien for the excess and such invalid lien, as the case may be, shall pass to the trustee."

The statutory lien involved is provided for in Sec. 194 of the Home Rule Charter of the City of Dallas,[1] which provides (R. 20):

"A lien is hereby created on all property, personal and real, in favor of the City of Dallas, for all taxes, ad valorem, occupation or otherwise. Said lien shall exist from January 1st in each year until the taxes are paid. Such lien shall be prior to all other claims, and no gift, sale, assignment or transfer of any kind, or judicial writ of any kind, can ever defeat such lien, but the Assessor and Collector of Taxes can pursue such property, and whenever found out, may seize and sell enough thereof to satisfy such taxes.

"All persons or corporations owning or holding personal property or real estate in the City of Dallas on the first day of January of each year shall be liable for all municipal taxes levied thereon for such year.

"The personal property of all persons owing any taxes to the City of Dallas is hereby made liable for all of said taxes, whether the same be due upon personal or real property, or upon both."

[1]The City of Dallas is incorporated under a special act of the Legislature of the State of Texas, which act, as amended, constitutes the Home Rule Charter of the City. (R. 19.)

STATEMENT

Major Appliance Company, Inc. was adjudged bankrupt on October 6, 1956, on the basis of an involuntary petition filed August 21, 1956 invoking the jurisdiction of the District Court because the case arises under the Bankruptcy Act. Major Appliance Company, Inc., was incorporated in April, 1956. Lee H. Skillman, doing business as Major Appliance Company, transferred to this corporation personal property owned by him as of January 1, 1956, including the personal property which gave rise to the City's claim herein.

Following the adjudication of bankruptcy, the City of Dallas filed a claim as a secured creditor for $2,911.16 ad valorem taxes on the above-described personal property, asserting a first and general lien against the assets of the bankrupt (R. 14-17). The City's claim was based on the statutory lien provided in the Home Rule Charter of the City of Dallas. Petitioner objected to the City's claim on the ground that the alleged lien was invalid against him as trustee by virtue of the express provisions of §67c(2) of the Bankruptcy Act (R. 17-18).[2] The facts were stipulated between the trustee and the City of Dallas (R. 19-25).

It is undisputed that Section 194 of the Home Rule Charter of the City of Dallas is a statutory lien in favor of the City of Dallas, a political subdivision of the State of Texas, on "all property, personal and real, * * * for all taxes, ad valorem, occupation or otherwise" (R. 19-20). Such statutory provision does not require recordation, pos-

[2] The trustee originally objected also on the ground, later abandoned, that the taxes were owed by Skillman.

session, seizure, or any other action in order to perfect the lien provided for thereunder. In the case of *In re Brannon*, 62 F. 2d 959 (5th Cir. 1933), the Court of Appeals described the broad scope of this statutory provision as follows (62 F. 2d at 962):

> "We think a true general lien for all city taxes is given the city of Dallas by the language last quoted, which adheres to the property notwithstanding its transfer and which, requiring no record, is good as a lien in bankruptcy. All property of the taxpayer falls under it, so that it is unnecessary to identify that assessed for the particular tax."

It is also undisputed that the lien asserted by the City of Dallas in this case was a statutory lien "on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property." (R. 24-25.)

After hearing, the referee overruled the objection and entered his opinion and an order approving the City's claim as a claim secured by a general lien, as provided in the Home Rule Charter of the City of Dallas (R. 4-14, 29). On petition to review (R. 26-29), the District Court affirmed the referee's order, with opinion (R. 30-32, 29-30).

The Court of Appeals affirmed the order of the District Court, holding that the word "debt" in Section 67c(2) of the Bankruptcy Act was not intended to include within its scope the claim of tax and lien for personal property taxes owing to the City of Dallas. The Court adopted the reasons stated by the referee and by the District Court in their opinions; it stated, as an additional reason for its holding, that the mischief sought to be prevented by the 1952

amendment to Section 67c of the Bankruptcy Act was the assertion of secret or hidden liens and that the lien on personal property asserted by the City of Dallas was "not within the mischief to be prevented."

REASONS FOR GRANTING THE WRIT

1. The court below has decided an important question of federal law which has not been but should be settled by this Court.

The effect of Section 67c(2) insofar as statutory liens on personal property for taxes are concerned is of vital importance in the administration of bankruptcy estates and proceedings. Nisi prius interpretations are contradictory. Compare *Matter of Gordon*, 27 J. N. A. Ref. Bankr. 85 (E. D. Mich. 1952), with *In re Baron*, 165 F. Supp. 186 (D. Conn. 1958). In virtually every bankruptcy proceeding other than "no asset" cases the referee passes on tax claims of states and political subdivisions. Are these tax claims secured by liens on personal property of the bankrupt valid as against the trustee? The answer depends entirely on the effect of §67c(2) of the Act. Legislation to exclude statutory TAX liens from §67c(2), recommended by the National Bankruptcy Conference and promoted by state taxing authorities, has failed of passage in Congress. H.R. 5796, 83rd Cong., 2nd Sess. 1954; see *In re Baron, supra*. Is not this further legislation necessary to limit, as contended by Dallas, the broad scope of §67c(2)? The answer turns on the matter of the proper interpretation of the section. Authorities on bankruptcy have noticed the import-

ance of authoritative resolution of these questions. 4 Collier on Bankruptcy (14th ed.) ¶67.281, p. 313; 4 Remington on Bankruptcy (1957 ed.) §1637.1, p. 106; *infra*, p. 8. By its holding in answer to these questions the Court of Appeals read into §67c(2) an implied exclusion, not apparent on the face of the statute, for "debts" in the form of taxes. Authoritative settlement of these questions by this Court is plainly in the public interest.

2. Petitioner urges that the decision of the court below is erroneous.

(a) The word "debt" as used in the Bankruptcy Act has a precise meaning not susceptible of inquiry into the legislative purpose of its use. Section 1(14) of the Bankruptcy Act (11 U. S. C. §1) defines the word "debt" as including "any debt, demand or claim provable in bankruptcy." Section 17a of the Bankruptcy Act (11 U. S. C. §35) clearly indicates that taxes are "provable debts," and the decisions uniformly so hold in their construction of §63 of the Bankruptcy Act (11 U. S. C. §103). *Ingels v. Boteler*, 100 F. 2d 915 (9th Cir. 1938), *aff'd*, *Botcler v. Ingels*, 308 U. S. 57 (1939). Section 64 of the Bankruptcy Act (11 U. S. C. §104) provides for priorities of debts and order of payment, and the fourth class debt priority is described as "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof." Under these provisions of the Bankruptcy Act itself the word "debt" is defined to include all provable claims, including "taxes" as one subdivision of the general class.

(b) The court below found "debt" as used in §67c(2) to be ambiguous, and thus meriting inquiry into the intention of Congress, "[a]greeing with those who say of the statute that the scope of its coverage is far from crystal clear * * *." Bankruptcy writers have condemned the statute for its lack of elaboration:

> "Well meant as the changes undoubtedly were, they have confounded rather than clarified the confusion about status of statutory liens * * *."

(4 Remington on Bankruptcy (1957 ed.) §1637.1, p. 106.)

In 4 Collier on Bankruptcy (14th ed.) ¶67.281, p. 313, the author does state the problem in these terms:

> "It is regrettable that this kind of ambiguity, so productive of the delay, expense, and inconvenience of litigation to obtain an authoritative interpretation and so easy to eliminate, was permitted to pass unchallenged through the legislative process."

But if this expressed preference for detail in the statute merits construction of §67c(2), available evidence as to Congressional intent does not justify the *exemption* from the section of liens for taxes enjoyed by a State or political subdivision thereof.

First. The statutory language was chosen by Congress with reference to other provisions of the Act, including presumably the definitions of "debt" referred to above. For example, Section 67c(2) strikes down statutory liens on personal property for debts owing to "any person, including any State or any subdivision thereof," whereas under Section 1(23) of the Bankruptcy Act (11 U. S. C. §1) the

word "persons" would not ordinarily include "any State or any subdivision thereof."

Second. An exemption for Dallas' tax lien rests on the creation of an ambiguity in §67c(2), and then on the attribution of an unexpressed exclusionary intent on the part of Congress, by resort to a different "mischief" which is not shown to have been before Congress *and* the sole object of Congress' legislation. The referee said:

> "There are debts other than taxes to States and subdivisions, which the States *may* seek to secure by liens. Such liens *would* be invalidated by its language in any event so that if taxes are excluded the amendment would not thereby be rendered meaningless." (Emphasis supplied.)

The Court of Appeals stated that

> "there are, or may be debts due states and subdivisions of states which are not true liens and which they may secure by liens, such as assessments for paving or other improvements, and such debts and liens would be invalidated by the language."[a]

Both of the statements recognize that some meaning must be given to the phrase "including any State or any subdivision thereof." In 4 Collier on Bankruptcy (14th ed.) ¶67.281, p. 313, the author says

> "It is perhaps unlikely that the draftsmen would have gone to the trouble of expressly including 'any State or any subdivision thereof' within the group of lienors affected by clause (2) if there was a purpose

[a] Section 67c(2) is not concerned with debts not secured by liens or debts secured by liens on real property. To the contrary, it invalidates only statutory liens for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession, levy, sequestration or distraint.

not to apply the clause to such lienors except insofar as its statutory nontax liens are concerned."

No attention has been called to any such "statutory non-tax liens," on personal property, effective without possession, levy, sequestration, or distraint, in favor of a State or subdivision thereof, with reference to which Congress acted in 1952 or even which exist now. The argument is made that they *may* be provided for under possible statutes in which event they would be included under §67c(2). But it does not follow from a tentative forecast of future possibilities, or even from a 1959 inquiry into statutory liens as they existed in 1952, that the all-inclusive term "debt" was used by Congress with an intention that it be limited in its application to such situations. A special exemption for the City of Dallas and others similarly situated, in derogation of the Bankruptcy Act word "debt", does actually make meaningless the enactment of §67c(2) without a showing that a mischief *other* than liens like Dallas' existed as a mischief sought by Congress to correct. Even then, the special exemption is unwarranted as a matter of construction without a showing that such evils were the *only* target of §67c(2).

(c) There is nothing more—or less—"secret or hidden" about statutory liens for taxes unaccompanied by possession or seizure or levy (as found by the Court of Appeals) than other liens which by definition are on the public statute-books but which do not require some open and advertent action in order to be deemed perfected—for example, landlords' liens[1] to which §67c(2) clearly applies.

[1] *E.g.*, Texas Revised Civil Statutes, Art. 5238.

If it is advisable as a matter of national policy that unperfected liens for State and local taxes be exempted from the broad condemnation of the act, such exemption should be specific and should be provided by the Congress, not the courts.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin S. Sloman, counsel for William J. Rochelle, Jr., Trustee in Bankruptcy of Major Appliance Company, Inc., Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on July 11, 1959, I served a copy of the foregoing petition for writ of certiorari on the Respondent herein by depositing the same in a United States mail box with first class postage prepaid, addressed to Henry P. Kucera, Esq., its counsel of record, at his post office address, 501 City Hall, Dallas, Texas.

Marvin S. Sloman

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APPENDIX.

1. Opinion of the Court of Appeals.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17405

WILLIAM J. ROCHELLE, JR., Trustee in Bankruptcy of Major Appliance Company, Inc.,

Appellant,

versus

CITY OF DALLAS,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(February 25, 1959.)

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: This is an appeal by the trustee in bankruptcy from an order of the district judge affirming an order of the Referee Elmore Whitehurst, which, over the trustee's objection that clause 2 of the 1952

Amendment to Sec. 67(c) of the Bankruptcy Act rendered such claimed lien invalid as against him, allowed the claim of the City of Dallas for $2911.16 for ad valorem taxes and approved it as secured by a valid lien.

Here the trustee, stating that he has found no reported decision of any federal district or appellate court which has passed on the precise question presented for decision here, argues that, on its face and by its plain terms, the invoked section includes, and invalidates, as to him, the City's claim.

The City, meeting the trustee's contention head on, relies strongly on the statute, the pertinent portion of which is set out in the margin,[1] and upon its established status as a lien holder.[2] Relying, too, on Section 67(b) of the Bankruptcy Act, which reads in part as follows:

> "Where by such laws such liens are required to be perfected and arise but are not perfected by bankruptcy, they may nevertheless be valid if perfected within the time permitted by and in accordance with

[1] "(c) Where not enforced by sale before the filing of a petition initiating a proceeding under this title, and except where the estate of the bankrupt is solvent: (1) though valid against the trustee under subdivision (b) of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title and such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision (a) of section 104 of this title; and (2) the provisions of subdivision (b) of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distrant of, such property, shall not be valid against the trustee."

[2] In Re: Brannon, 62 F(2) 959; City of Dallas v. Crippen, 171 F(2) 526; Brans v. City of Dallas, 217 F(2) 640; Urbush v. City of Dallas, 260 SW(2) 148; Ex. Bank & Trust Co. v. Tubbs, 246 F(2) 141.

> the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof to the court."

and on the opinion of Judge Anderson in The Matter of Baron, 165 F. Supp. 185, it insists that referee and district judge were right in holding that it had a good and valid claim and lien.

Agreeing with those who say of the statute that the scope of its coverage is far from crystal clear, we are nevertheless of the view that the referee and the district judge were right in holding as they did that the word "debt" in the invoked section was not intended to, and did not, include within its scope, and deny validity to, the City's claim of tax and lien.

In a carefully prepared opinion, citing the cases set out in note 2, *supra*, holding that the City of Dallas has a real lien existing from January 1st of each year until the taxes are paid and that neither recordation, seizure, nor any other act is required to fix and give notice of the lien, the referee approached the question for decision with recognition of the fact, that while the terms "debts" and "taxes" are sometimes used by lawmakers as interchangeable and as inclusive each of the other, generally speaking they are not so used; and that the language of the amendment has therefore been characterized by text writers and others as unsatisfactory, if not ambiguous.

So approaching the construction he quite correctly concluded *that, though the word "debt" used in a statute is at times broad enough to include a tax, in this instance the*

context seems to permit if not to require the construction that the use of the word "debts" does not include taxes. Pointing out that there are, or may be, debts due states and subdivisions of states which are not true liens and which they may secure by liens, such as assessments for paving or other improvements, and such debts and liens would be invalidated by the language, the referee, rejecting the contention that if taxes are excluded from the amendment, the reference to states and subdivisions would thereby be rendered meaningless, announced the firm conclusion that taxes are not dealt with in the section. Stating:

> "It seems to me that in the absence of a definite expression of legislative intent by congress to change a previously existing rule in a substantial way, that interpretation of statutory language, if it is a permissible interpretation, should be adopted which makes the least change in the previously settled law."

he concludes that the invoked section does not invalidate the city's lien and that the objection of the trustee should be overruled.

The district judge, in affirming the referee's order, states:

> "Our legislative bodies have quite uniformly treated the subject of taxes in separate columns, titles and chapters from those obligations of man designated as 'debts'. The amendment in question makes no reference whatever to taxes. Taxes are ordinarily as in this case made a lien as a matter of law while a debt due for labor or material, for instance, must be filed and a record made of the claim. An overt act is required of claimant. Not so in case of claim for taxes.

> "To merge claims for debts and taxes in one common category would render taxes uncollectible in cases of this type, or at least require the City to foresee the faltering steps of the taxpayer and run a race with other creditors to be first to get possession by consent, attachment or some drastic ancillary process. We think clearly that the purpose of the amendment did not contemplate such."

Judge Anderson, of the United States District Court for the District of Connecticut, in The Matter of Baron, 165 F. Supp., 186, *supra*, takes the same position and gives expression to substantially the same view.

For the reasons stated by them and for the additional reasons following, we agree with these views. Recourse to any work of reference dealing with words and their meaning, including particularly Words and Phrases, Vol. 11, "Debt", at page 278 to 286,[1] where numerous instances in point appear, will show that while occasionally the words "debts" and "taxes" are used interchangeably, ordinarily this is not so. Indeed in most instances they are used distinctively. This established, it follows that to support a construction of a statute that the word "debt" includes taxes, there must be some reason shown to so read a statute other than the fact that sometimes the word "debt" will include taxes. This reason must be sought in the purpose of the statute, that is the mischief sought to be prevented and the appropriate means to achieve that end. The mischief here, it seems clear to us, was to protect creditors

[1] After quoting from numerous cases holding "Generally tax is not debt in ordinary sense of the word", Forest City v. Levy, (Mo.) 33 Fed(2) 984; the text, on page 285, under the heading "The term debt in its ordinary sense does not include a tax", collects and cites a long list of cases in point.

of the bankrupt against secret or hidden liens for the security of debts. The means was to invalidate them as against the trustee. The City's lien asserted here is not a secret or hidden lien, and is, therefore, we think, not within the mischief to be prevented. On the contrary, the law which gives the lien at once puts the prospective purchaser of, or dealer with, property on notice to inquire, and furnishes him with the means to find out, if and what taxes are due and owing. *Fisher v. Rio Tire Co.*, 65 SW(2) 751; *City of Dallas v. Menezes*, 16 F(2) 779; Remington on Bankruptcy, Vol. 4, Sec. 1637.1.

The judgment was right. It is AFFIRMED.

2. Opinion of the District Court.

In the

District Court of the United States

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. 4521

In the Matter of

MAJOR APPLIANCE COMPANY, INC.

BANKRUPT

The referee certifies to the Court in substance the following question:

> Does the 1952 amendment to Section 67 of the Bankruptcy Act invalidate a claim for taxes?

Our legislative bodies have quite uniformly treated the subject of taxes in separate columns, titles and chapters from those obligations of man designated as "debts." The amendment in question makes no reference whatever to taxes. Taxes are ordinarily as in this case made a lien as a matter of law while a debt due for labor or material, for instance, must be filed and a record made of the claim. An overt act is required of claimant. Not so in case of claim for taxes.

To merge claims for debts and taxes in one common category would render taxes uncollectible in cases of this type, or at least require the City to foresee the faltering steps of the taxpayer and run a race with other creditors

to be first to get possession by consent, attachment or some drastic ancillary process. We think clearly that the purpose of the amendment did not contemplate such.

We adopt the opinion of the Referee.

/s/ T. WHITFIELD DAVIDSON
United States District Judge

July 21, 1958

3. Opinion of the Referee in Bankruptcy.

In the

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. 4521

In the Matter of

MAJOR APPLIANCE COMPANY, INC.

BANKRUPT

OPINION OF THE REFEREE WITH RESPECT TO OBJECTION OF TRUSTEE TO CLAIM OF THE CITY OF DALLAS

The City of Dallas, on May 6, 1957, filed its first amended claim (claim No. 36) in this case as a secured claim in the amount of $2,911.16. On the 4th of the following month, the Trustee filed objections to the claim praying for an order that it be disallowed. On the 14th of June there was filed a stipulation of facts agreed to between the City and the Trustee, William J. Rochelle, Jr., which contains all the facts necessary to a decision in this matter.

The stipulation recites in substance: The City of Dallas has a home rule charter, section 194 of which asserts a lien on all property, personal and real for all taxes, ad valorem, occupation or otherwise, existing from January first of each year until the taxes are paid. Lee H. Skillman, who on January 1, 1956, was doing business in Dallas under the trade name of Major Appliance Company furnished

a sworn rendition of personal property for the taxable year of 1956 against which ad valorem taxes in the amount of $2,911.16 were duly levied, which are past due and unpaid. In April of 1956 Skillman and others formed a corporation, Major Appliance Co., Inc., which took over the assets of the former company including the personal property against which the taxes were levied. The corporation subsequently was adjudicated a bankrupt. Rochelle was duly appointed and qualified as trustee and in that capacity reduced assets of the estate, including much of the identical property covered in the rendition of taxes, into money in an amount well in excess of the amount of taxes levied. The City did not have possession of, nor had it levied on, sequestrated or distrained the property involved.

The claim of the City is that under its charter it has a specific, perfected lien, requiring no recordation nor any act by it whatsoever, which attached to the personal property as of January 1, 1956, and that the proceeds of the sale in the hands of the trustee are liable for payment of the taxes.

The starting point is that the Court of Appeals for the Fifth Circuit has held that under its charter provisions the City of Dallas has a true statutory lien on personal property for taxes. *In re Brannon*, 5 Cir., 62 F. 2d 959; *City of Dallas v. Crippen*, 5 Cir., 171 F. 2d 526.

The question is whether this lien is invalidated against the trustee in bankruptcy by virtue of the following lan-

guage added to section 67 c of the Bankruptcy Act by an amendment enacted in 1952:

> "* * * (2) the provisions of subdivision b of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property, shall not be valid against the trustee * * *."

Both the Brannon and Crippen cases were decided before the enactment of the 1952 amendment. *Brans v. City of Dallas*, 5 Cir., 217 F. 2d 640 was decided afterwards in 1954 on the basis that the City had a lien, but so far as the court's opinion discloses, the 1954 amendments were not called to its attention nor was the validity of the City's lien as against the trustee challenged, as it is in the instant case.

It will be observed that the amendment does not refer to liens for "taxes" but for "debts." The question therefore comes down to deciding whether in the use of the word "debts" the Congress intended to include or exclude liens for city taxes. The language of the amendment has been condemned as ambiguous by the text writers who do not appear disposed to go too far ut on a limb in interpreting it. Professor Kennedy, the author of a 1954 revision of that part of Collier on Bankruptcy, 14th edition, which deals with this subject, says "It is regrettable that this kind of ambiguity, so productive of the delay, expense, and inconvenience of litigation to obtain an authoritative inter-

pretation and so easy to eliminate, was permitted to pass unchallenged through the legislative process." (Volume 4, p. 313). In this writing he takes a neutral position, although perhaps seeming to lean in the direction of including city tax liens within those invalidated by the amendment. He discusses the question on pages 312 and 313 of Volume 4 as follows:

> "Finally, there is basis for arguing that state tax liens on personalty unaccompanied by possession are not within clause (2) although they are subject to postponement under clause (1). Clause (2) speaks only of 'statutory liens . . . for debts owing to any person, including any State or any subdivision thereof.' While 'debt' is defined broadly enough in § 1(14) to include a tax claim, the definitions in § 1 do not apply when they would be inconsistent with the context. An argument that the context requires the word 'debts' to be construed to exclude tax claims in § 67c (2) may be drawn from the fact that clause (1) explicitly postpones statutory liens 'including liens for taxes or debts owing to the United States or to any State or any subdivision thereof.' The counter argument may be made that in view of the breadth of the definition of 'debt' in § 1(14) the draftsmen must be taken to have intended to include liens for taxes as well as other claims owing a state or subdivision in the absence of any clear exclusionary language. It is perhaps unlikely that the draftsman would have gone to the trouble of expressly including 'any State or any subdivision thereof' within the group of lienors affected by clause (2) if there was a purpose not to apply the clause to such lienors except insofar as its statutory nontax liens are concerned."

However, in an article apparently written later entitled STATUTORY LIENS IN BANKRUPTCY appearing in the May, 1955 issue of the Minnesota Law Review (Vol. 39 page 697

at page 718), Professor Kennedy seems to take the contrary view. He says:

> "The most noteworthy change effected by the 1952 amendment to Section 67c, however, was the invalidation against the trustee, by a new clause (2), of statutory liens created by state law for debts on personal property unaccompanied by possession, levy, sequestration, or distraint of the property. Since liens for taxes or debts are referred to in clause (1) of the new subdivision which provides for postponement, it may be inferred that tax liens are not invalidated by clause (2), although liens for debts owing any state or subdivision thereof are explicitly nullified. At all events federal tax liens clearly are not invalidated by the new clause."

In a footnote to this paragraph he says:

> "Apparently the only ruling on the point to date is that of Referee Katcher in Matter of Gordon, 27 J. N. A. Ref. Bankr. 85 (E. D. Mich. 1952), invalidating as against the trustee city, county, and state tax liens on personalty unaccompanied by possession or process. The ruling is reported to have been subsequently vacated, and the case presumably has since been settled without the necessity for final determination of the matter. Hearing, supra note 39, at 6. The ruling nevertheless prodded representatives of state and local taxing authorities to seek an amendment of § 67c(2) which would eliminate any doubt as to the inapplicability of the invalidation provision to tax liens. A bill, H. R. 5796, would have inserted the following language parenthetically and immediately following the word 'debts' in § 67c(2): 'as distinguished from statutory liens for taxes.' The bill passed the House but died in the Senate. Although the National Bankruptcy Conference took the position that the amendment was unnecessary in view of the context, the phraseology of the bill that passed the House followed the recommendation of the Conference. Id. at 26."

I may add that no judicial decision other than that of Referee Katcher has been found.

Remington on Bankruptcy, Volume 4, page 106, also appears to view the tax liens as valid against the trustee. His discussion of the subject is as follows:

> "Liens, the property subject to which is not readily apparent to other creditors, have sometimes been referred to as 'floating' liens and are in general disfavor because of the confusion they cause in sizing up credit risks. A statutory lien having this characteristic is quite as disconcerting as an encumbrance on a shifting stock in trade or a secret lien. Furthermore, certain decisions since the 1938 introduction of § 67(c) had thrown light on a loophole which could permit junior lienholders to gain the advantage of the restrictions imposed by that section on the amount of wage and rent liens, leaving the bankrupt's estate in no better position than it was before the restriction was imposed. With this in mind, Congress, by Act of July 7, 1952, started out to clarify that section, and to improve it by stopping the loophole with a provision for preserving liens for the benefit of the estate.
>
> "Well meant as the changes undoubtedly were, they have confounded rather than clarified the confusion about status of statutory liens by dividing them into two classes: (1) consisting of such liens generally, whether relating to realty or personalty, as dealt with in § 67(b); and (2) such liens on personalty 'not accompanied by' possession of the personalty or its seizure. Section 67(b) had already been construed as mandatorily excepting statutory liens generally from being considered voidable preferences, regardless of when the lien arose. If the language of the amended statute is accepted literally, it gives rise to a new lien nullification provision and one which is without restriction to any particular period prior to bankruptcy

and regardless of whether the elements of a voidable preference are present. It is only necessary for the lien to be a statutory lien on personal property and not accompanied by possession or seizure thereof for it to be 'not valid against the trustee.'

"Section 67(c), prior to the 1952 amendment thereof, merely postponed such liens, where they were on personalty and 'not accompanied by possession of such property,' to the priority of payment accorded to expenses of administration, certain other expenses, and wage claims in limited amount by § 64(a) of the Act. By one of the 1952 amendments, however, Clause (2) of § 67(c) is turned into a flat declaration that 'the provisions of subdivision b of this section to the contrary notwithstanding,' statutory liens 'on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property, *shall not be valid* (underscoring [emphasis] supplied) against the trustee.'

"It is not believed that such was the actual legislative intent, inasmuch as the committee reports dealing with the amendatory Act of July 7, 1952, indicate only that the proposed changes in § 67(c) were designed to clarify the statute with regard to liens analogous to 'floating' liens and to plug the loophole above mentioned. The loophole was, in fact, plugged by insertion of a provision authorizing preservation of § 67(c) liens for the benefit of the bankrupt estate; and it seems odd that the Congress would have gone much beyond this without some clearer statement of purpose."

It is to be noted that as pointed out by Professor Kennedy, in two places in section 67 of the Bankruptcy Act, in which section the amendment under consideration is found, once in the preceding subsection and once in the very same subsection as the amendment, "debts" and

"taxes" are apparently distinguished. In subdivision b the following appears:

> "The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for *taxes and debts* owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State may be valid against the trustee * * *" (underscoring [emphasis] supplied).

In the first part of subsection c relating to postponement of liens this language is used:

> "* * * though valid against the trustee under subdivision b of this section, statutory liens including liens for *taxes or debts* owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act * * *."

The definition section of the Bankruptcy Act, section 1, does not contain a definition of the word "taxes." "Debt" is defined by subsection (14) of this section to "include any debt, demand, or claim provable in bankruptcy." This definition of "debt" as Professor Kennedy also points out would seem to be broad enough to include a tax, but all definitions in section 1 are limited by a provision at the beginning of the section that the words are to be construed as defined therein "unless the same be inconsistent with the context." In this instance the context seems to permit, if not to

require, a distinction to be drawn between "debts" and "taxes" so that "debts" would not include "taxes."

There are debts other than taxes to States and subdivisions of States, which the States may seek to secure by liens. Such liens would be invalidated by its language in any event so that if taxes are excluded the amendment would not thereby be rendered meaningless.

In a case just decided, the Court of Appeals for the Fifth Circuit says: "The quest for congressional intent all too often leads to a will-o-the-wisp trail where no foot can tread."[1] It seems to me that in the absence of a definite expression of legislative intent by Congress to change a previously existing rule in a substantial way, that interpretation of statutory language, if it is a permissible interpretation, should be adopted which makes the least change in the previously settled law. Consequently, I am constrained to hold that the 1952 amendment to section 67c of the Bankruptcy Act does not invalidate the lien for taxes of the City of Dallas as against the trustee in the instant case, and therefore will overrule the objection of the trustee to the City's claim.

/s/ ELMORE WHITEHURST

Referee in Bankruptcy

Dated at Dallas, Texas, this the 12 day of June, 1958.

[1] Cabot Carbon Co., et al. v. National Labor Relations Board, No. 16734, decided June 9, 1958.

4. Judgment of the Court of Appeals.

JUDGMENT

Extract from the Minutes of February 25, 1959

No. 17405

WILLIAM J. ROCHELLE, JR., Trustee in Bankruptcy of Major Appliance Company, Inc.,

versus

CITY OF DALLAS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, William J. Rochelle, Jr., Trustee in Bankruptcy of Major Appliance Company, Inc., be condemned to pay the costs of this cause in this Court, in due course of the administration of the estate of said Bankrupt.

